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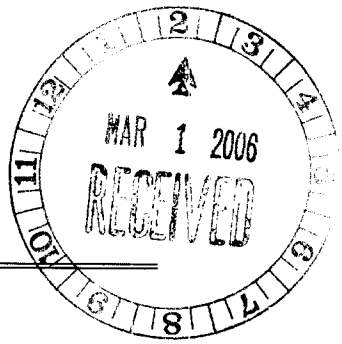

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY – CONTROL AND OPERATING LEASES/AGREEMENTS – CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	)	Finance Docket No. 33388 (Sub-No. 100) (Petition for Supplemental Order)

REPLY OF BRIDGEWATER RESOURCES, INC. AND ECDC ENVIRONMENTAL, L.L.C. TO NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY'S MOTION TO DISMISS

BRIDGEWATER RESOURCES, INC.
ECDC ENVIRONMENTAL, L.L.C.

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Dated: March 1, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY – CONTROL AND OPERATING LEASES/AGREEMENTS – CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	)	Finance Docket No. 33388 (Sub-No. 100) (Petition for Supplemental Order)

REPLY OF BRIDGEWATER RESOURCES, INC. AND ECDC ENVIRONMENTAL, L.L.C. TO NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY'S MOTION TO DISMISS

Pursuant to 49 C.F.R. § 1104.13, Bridgewater Resources, Inc. ("BRI") and ECDC Environmental, L.L.C. ("ECDC") hereby reply to Norfolk Southern Corporation and Norfolk Southern Railway Company's (collectively "NS") Motion to Dismiss Petition for Clarification or In the Alternative for Supplemental Order of Bridgewater Resources, Inc. and ECDC Environmental, L.L.C. ("Motion").

I. Background and Summary

As discussed in BRI/ECDC's Petition, BRI operates a fully-permitted solid waste transfer facility (the "facility") near Manville/Port Reading Jct. in Bridgewater Township, Somerset County, New Jersey. BRI acquired the facility from its prior owner, which was in bankruptcy, on July 1, 2003. BRI and ECDC began shipping substantial

volumes of non-toxic municipal solid waste ("MSW") from the facility to a landfill in South Carolina served by CSXT in the fall of 2003 in joint NS-CSXT service, with NS providing switching service between the BRI facility and nearby Manville Yard and CSXT performing the line haul from Manville Yard to the destination in South Carolina. When these MSW movements began, NS performed switching services satisfactorily and BRI/ECDC did not envision any reason to change switching carriers.

NS asserts that BRI/ECDC's Petition is "eight years out of time" because BRI/ECDC did not participate in either the original Conrail control proceeding or the subsequent five-year oversight proceedings. Motion at 3, 14, 15. However, the current ownership of BRI and ECDC were not involved with rail shipments from the BRI facility until mid-2003, and had no reason to participate in prior phases of the Conrail control proceeding (they cannot speak for the prior owner of the facility).

The service and other problems that led to the instant petition did not arise until mid-2005,[1] and BRI/ECDC initially attempted to work them out with NS through negotiations. As described below, NS was unresponsive to BRI/ECDC's needs, and after BRI was twice cited by the New Jersey Department of Environmental Protection ("NJDEP") for the accumulation of trash outside the waste transfer building (caused by NS's sporadic switching service), BRI/ECDC decided to invoke the jurisdiction of this Board by filing their Petition.

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[1] These problems are described in detail at pp. 4-6 and 10-11 of the Petition.

NS asserts that it "takes BRI's complaints about service seriously [and] is making every effort to remedy the problems BRI has identified," and "has taken steps that it believes will improve the situation." Motion at 3, 12. This is simply not the case. Beginning in mid-2005 and continuing up to the date of filing of their Petition on January 20, 2006, BRI and ECDC have contacted NS numerous times via email and telephone in an effort to get the carrier to provide switching service in accordance with their needs. NS responded sporadically, stating that it would look into the situation and try to provide adequate service, but NS never responded substantively to any of BRI/ECDC's communications regarding poor service. NS has not contacted BRI regarding service matters (or anything else) since the Petition was filed, and BRI/ECDC are unaware of any "steps" NS has taken that NS "believes will improve the situation."

The present situation is intolerable, not only because it hinders BRI and ECDC from shipping the MSW processed at the BRI facility in a timely manner and at contracted volumes, but because it continues to impede the efficient transfer and disposal of MSW through the only waste transfer facility in Somerset County, New Jersey. It also exposes BRI to possible additional citations by the NJDEP due to the accumulation of waste at the facility. This is a matter of considerable concern to the citizens of Somerset County from an environmental and public-health standpoint.

Rather than making a serious effort to address the concerns raised in BRI/ECDC's Petition, NS responded by filing its Motion to Dismiss. NS's Motion is

without merit and should be denied by the Board under the applicable standards for dismissal. As BRI/ECDC demonstrate in this Reply and the accompanying Supplemental Verified Statement of Paul H. Reistrup, the first aspect of their Petition (seeking clarification of Decision No. 89) raises issues of material fact concerning the boundaries of the North Jersey Shared Assets Area ("NJSAA") and Conrail's right to switch the BRI facility from Manville yard that remain unresolved notwithstanding the materials submitted in NS's Motion. The facts alleged in the petition must be construed in a light most favorable to BRI/ECDC for purposes of a motion to dismiss, and the facts so construed warrant the clarification they seek. In addition, no showing of changed circumstances is required with respect to a request for clarification of a rail merger decision.

The second, alternative aspect of BRI/ECDC's Petition seeks a supplemental order permitting Conrail to switch cars between the BRI facility and Manville Yard. BRI/ECDC show below that NS has requested the Board to apply the wrong legal standard, and that dismissal is inappropriate under the correct standard. No showing of anticompetitive conduct is required, and the Board clearly has the authority to supplement Decision No. 89 by authorizing Conrail to switch the BRI facility if it concludes that the public interest warrants such relief.

II. The Standard for Dismissal

The Board may dismiss a case "only when the Board finds that there is no basis on which it could grant the relief sought." STB Docket No. 41191 (Sub-No.1), *AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company* ("*AEP Texas*"), STB served March 19, 2004, at 2. In making this determination, the facts involved in the dispute must be construed in the light most favorable to the complainant. *Id.* A motion to dismiss should be granted only in instances in which there is no basis for relief. NS has not made such a showing here.

NS incorrectly implies that a motion to dismiss should be granted if it appears that the complainant or petitioner is "unlikely to prevail" in order to prevent "unnecessary costs and burdens" on the Board and the parties. Motion at 14-15. This is not the standard. The Board has stated that "[a] decision on a motion to dismiss is not an indication of how the case will ultimately be decided on the merits after all the evidence is submitted." *AEP Texas* at 2. To allow dismissal of a case based on NS's standard would deny a complainant the opportunity to lay out its case in full and utilize discovery to obtain facts necessary to substantiate its claim.[2]

The Board recognizes the importance of allowing a complainant the opportunity to present evidence and has stated that "motions to dismiss prior to the

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[2] NS has also filed a Motion for Protective Order quashing discovery requests submitted by BRI/ECDC in this proceeding. BRI/ECDC are filing a separate reply in opposition to that motion.

submission of evidence are generally denied, to insure that participants have a full and fair opportunity to meet their burden of proof." Docket No. 42060, *North American Freight Car Association – Protest and Petition for Investigation – Tariff Publications of the Burlington Northern and Santa Fe Railway Company*, STB Served August 13, 2004, at 9, citing Docket No. 40169, *National Grain & Feed Association v. Burlington Northern Railroad*, ICC served June 1, 1990, at 4 (unpublished decision). As BRI/ECDC have not had an opportunity to pursue discovery and present their complete evidentiary case on this matter, NS's Motion should be denied.

NS states that the present case is "not dissimilar" to *Zoneskip, Inc. v. United States Parcel Service, Inc.*, 8 I.C.C.2d 645 (1992), a motor carrier case in which the Board's predecessor dismissed a complaint because it was based on incorrect legal premises and no facts were in dispute. However, NS never explains why the *Zoneskip* case is even remotely similar to the case at hand, and in fact the cases are dramatically different. *Zoneskip* was a motor carrier case in which the complainant alleged that certain services of the defendants were common carrier service, as opposed to contract service. The complaint in that case was filed on February 25, 1991, and the defendants' motion to dismiss was not ruled upon until June 26, 1992. The ICC had already heard several rounds of testimony and argument from the parties, and the complainant had already engaged in discovery, when the ICC ruled on the motion to dismiss. The ICC ultimately

determined that the matter was purely legal, because even accepting the complainant's factual allegations as true, its position was incorrect as a matter of law.

The instant case does not share any of these attributes. BRI/ECDC have raised issues of material fact concerning the limits of the NJSAA at Port Reading Jct. and Conrail's ability to use tracks within the NJSAA to serve the BRI facility, and have sought discovery from NS and Conrail in an effort to develop a complete record on these issues. As explained below, NS's motion does not resolve these factual issues and dismissal is therefore inappropriate.

III. NS's Motion to Dismiss BRI/ECDC's Request for Clarification Is Unfounded

NS claims that BRI/ECDC's request for clarification should be dismissed for two reasons. First, NS argues that no facts remain in dispute because the Transaction Agreement, which the Board approved in Decision No. 89, is clear on its face. As shown below, NS and BRI/ECDC disagree on the meaning of the term "CP-Port Reading Jct." in the Transaction Agreement.[3] BRI/ECDC support their interpretation with an expert opinion by Paul Reistrup, which discusses the common usage of the term "CP" in the railroad industry. In ruling on a motion to dismiss, all factual disputes must be resolved in favor of the non-moving party, which means that the Board must interpret "CP-Port Reading Jct." to include the entire interlocking at Port Reading Jct. (including the tracks

[3] Both parties agree that, under the Transaction Agreement, the NJSAA extends west along the former Conrail Lehigh Line to "CP-Port Reading Jct."

used to serve BRI). *AEP Texas* at 2. When the disputed facts are viewed in the light most favorable to BRI/ECDC, it is clear that NS's Motion must be denied.

Second, NS argues that the request for clarification is really a request to reopen the Conrail control proceeding, *i.e.* by modifying the Transaction Agreement. BRI/ECDC's request for clarification does not seek any such modification, which means the Board may rule on the request without a showing of changed circumstances.

A. Issues of Material Fact Concerning BRI/ECDC's Petition for Clarification Remain Unresolved

Under the precedents cited in Part II above, the Board may not dismiss a proceeding if there is a basis for the petitioner's claim when the facts are construed in the light most favorable to it, particularly when it has not had the opportunity to present all relevant evidence. NS argues that there is no issue of fact in this case. However, material facts remain in dispute concerning the boundaries of the NJSAA and the extent of Conrail's operating rights in the Port Reading Jct. area, which in turn depend on the definition of "CP-Port Reading Jct." as that term is used in the Transaction Agreement.

NS appears to claim that "CP-Port Reading Jct." should be interpreted as meaning the division of ownership between Conrail and NS (formerly Pennsylvania Lines LLC) at Milepost 35.92 on the Lehigh Line.[4] However, as Mr. Reistrup testifies, the

[4] This milepost location is located within the interlocking governing train movements at Port Reading Jct. It is west of the junction between the Lehigh and Trenton Lines, but east of the switch connection between the Lehigh Line and the Royce Running Track. *See* Exhibit 5 to Mr. Reistrup's original Verified Statement.

ordinary meaning of the term "CP" or controlled point in railroad parlance is that it includes all railroad facilities (track, signal circuits and appurtenant real estate) within the interlocking involved, and is not a single "point."[5] NS's Witness Tierney, who is Conrail's Chief Engineer, confirms that a CP includes the switches and signals controlling access to the interlocking, and that Conrail controls the interlocking (CP) at Port Reading Jct. which governs the train movements of three railroads (NS, CSXT and Conrail). Tierney V.S. at 2.[6]

As Mr. Reistrup notes, the plain meaning of the term "CP-Port Reading Jct." is that it includes everything between the approach signals for the interlocking at that location, which Conrail controls (and presumably has the right to operate over, regardless of whether it owns all or only part of the property in the interlocking). Had the parties to the Transaction Agreement desired to specify a particular point within the interlocking as the boundary for the NJSAA, they could easily have done so rather than using the broader term "CP-Port Reading Jct."

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[5] *See* Mr. Reistrup's original V.S. at 5-6 and his supplemental V.S. at 2-4. This is not to say that a CP includes non-railroad property, and NS mis-characterizes Witness Reistrup's original testimony as describing the CP at Port Reading Jct. as encompassing "an area at least two miles in radius" (Motion at 10). Mr. Reistrup merely testified that a CP ordinarily includes all railroad facilities within an interlocking.

[6] It is should be noted that Mr. Tierney does *not* testify that the boundary of the NJSAA is denoted by the division of ownership between Conrail and NS at Milepost 35.92, which is the implication NS apparently wishes to convey.

The meaning of the term "CP-Port Reading Jct." as used in the Transaction Agreement to delineate the boundary of the NJSAA is critical to resolution of BRI/ECDC's clarification request. If the term includes everything within the interlocking at Port Reading Jct., then Conrail can switch cars between the BRI facility and Manville Yard using tracks and facilities located entirely within the NJSAA. NS's position that the term "CP-Port Reading Jct." should be given a narrower construction means, at most, that the term is ambiguous. It is certainly not clear that the term embraces only property that Conrail owns within the interlocking or CP, as NS implies, and in fact Mr. Reistrup's broader interpretation of the term is supported by the testimony of NS's own witness, Mr. Tierney. *See* Reistrup Supp. V.S. at 3.

For purposes of NS's motion to dismiss, the facts must be construed in a light most favorable to BRI/ECDC. *AEP Texas*, *supra*. Such a construction indicates that "CP-Port Reading Jct." includes all trackage and other railroad facilities within the limits of the interlocking for the junction between the Lehigh and Trenton Lines, in which event BRI should prevail on its clarification request. Dismissal of BRI/ECDC's Petition thus is inappropriate.

B. The Petition for Clarification is Not a Petition to Reopen and There Is No Need to Show Changed Circumstances

Next, NS claims that BRI/ECDC's request for clarification is in fact a request to reopen Decision No. 89 for purposes of "rewriting" the Transaction Agreement, and that BRI/ECDC have failed to meet the standards for reopening. Motion

at 14-15. Contrary to NS's allegation, BRI/ECDC's Petition does not seek to reopen the Conrail control proceeding for any such purpose.

BRI/ECDC's request for clarification asks the Board to clarify the limits of the NJSAA in the Port Reading Jct. area, and whether Conrail can switch the BRI facility pursuant to the terms of the Transaction Agreement and the NJSAA Operating Agreement, by interpreting ambiguous terms in a contract that the Board approved as part of its approval of the control transaction. The Board has recognized that "[a] prior decision may be clarified in any instances in which there appears to be a need for a more complete explanation of the action taken therein." Docket No. 33388, *CSX Corporation, et al. – Control and Operating Leases/Agreements – Conrail Inc, et al.*, Decision No. 96, STB served Oct. 19, 1998, at 7, *citing UP/SP* (Finance Docket No. 32760), Decision No. 57, slip op. at 3 (STB served Nov. 20, 1996). There is no indication in this or any other Board decision that changed circumstances must be shown as a condition precedent to obtaining clarification of a rail merger decision.

Even if a showing of changed circumstances were required, BRI/ECDC's Petition meets this standard. BRI acquired the subject waste transfer facility in mid-2003, and it and ECDC are relatively new rail shippers from this location. They began shipping MSW in relatively high volumes from the BRI facility in the fall of 2003, and did not experience significant problems with NS's switching service until mid-2005. These recent problems are substantial, and have directly resulted in the issuance of two citations

by the NJDEP against BRI and its President, William W. Gay (personally), for failure to control litter, debris, unprocessed waste, process residues and effluents at the BRI waste transfer facility in violation of the Solid Waste Management Act and/or the Solid Waste Utility Control Act.[7] BRI and Mr. Gay were ordered to correct these problems, and a penalty of $12,000.00 was assessed (subject to an administrative hearing, which BRI and Mr. Gay have requested).

Under New Jersey law, the NJDEP is authorized to access a civil administrative penalty of not more than $50,000.00 for each violation, and each day during which the violation continues constitutes an additional, separate and distinct offense. NS's failure to provide adequate switching service potentially subjects BRI and Mr. Gay (individually) to significant future fines, and continued service problems could potentially result in the revocation of BRI's license for waste collection and disposal.

These circumstances did not exist either when Decision No. 89 was issued or during most of the subsequent five-year oversight period. The BRI facility had a different owner (who subsequently went bankrupt), and very little MSW moved from the facility prior to the fall of 2003. As new shippers who are facing new and potentially

[7] Copies of the citations and related correspondence are included in the Appendix to BRI/ECDC's Petition.

severe environmental problems, BRI/ECDC have met any need for a showing of changed circumstances.[8]

IV. NS's Motion to Dismiss BRI/ECDC's Petition for Supplemental Order Fails to Apply the Standards for Issuance of Such Orders in Rail Merger Cases

NS's Motion attempts to change the standards which the Board applies to supplemental order proceedings in rail consolidation cases. First, NS argues that the Board should treat BRI/ECDC's request for a supplemental order as a competitive access claim, and apply the *Midtec* factors. Second, NS argues that BRI/ECDC should make a showing of changed circumstances based on precedent that is no longer applicable. As shown below, NS's proposed standards ignore the present case law related to supplemental orders, and have no bearing on whether a supplemental order should be issued here.

A. The *Midtec* Factors Are Not Applicable to this Case

NS couches BRI/ECDC's request for a supplemental order as a claim for competitive access. NS then argues that the Board should treat BRI/ECDC's petition as a request for competitive access that is subject to standards set forth in *Midtec Paper Corp.*

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[8] In this regard, NS argues that BRI/ECDC are not unlike other shippers who sought unsuccessfully to be included in the SAAs in the Conrail control proceeding. This argument does not support dismissal of the Petition, because it raises a factual issue. In any event, as explained above, the BRI facility is in a unique location, and BRI/ECDC are asking the Board to rule that it can already be served by Conrail under the transaction Agreement and the NJSAA Operating Agreement – not that the NJSAA should be expanded to include the BRI facility or any other shipper facility.

v. Chicago & N.W. Transp. Co., 3 I.C.C.2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) ("*Midtec*"). There is no basis for this approach.

BRI is requesting a supplemental order in a rail merger case, not a claim for competitive access. Its Petition could not be more clear as to this point. The *Midtec* factors discussed in NS's Motion are applied in competitive-access cases brought under 49 U.S.C. § 10101, which the Board views as requiring a showing of anti-competitive conduct by the incumbent railroad. BRI's request for a supplemental order is governed by 49 U.S.C. § 11327, which applies to decisions in rail merger and consolidation proceedings, not § 10101.

The *Midtec* case did not involve a railroad merger or consolidation, but a request for terminal trackage rights under 49 U.S.C. § 10101. The key concern in a § 10101 case is whether the incumbent carrier "has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." *Midtec* at 181. The *Midtec* standards, however, do not apply to merger proceedings at all – much less to requests for supplemental orders pursuant to 49 U.S.C. §11327. As the Board stated in its decision approving the *UP/SP* merger:

> Whether the ICC ever applied its relatively exacting Midtec precedent in the context of a merger is a matter of some debate. In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad "public interest" standard that is in section 11103(a) itself.

> Congress gave us broad authority in both the public interest standard in section 11103 and in the public interest standard of section 11343. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest as the ICC did in the past.

Union Pac. Corp., et al. – Control and Merger – Southern Pac. Rail Corp., et al., 1 S.T.B. 233, 448-449 (1996).

NS cites no decision in which the *Midtec* factors have been applied to a request for supplemental order involving a rail merger proceeding under § 11327, and indeed there is no such decision. Instead, the Board has held that requests for supplemental orders involve the public interest standard. *See* Finance Docket No. 32299 (Sub-No. 1), *Norfolk Southern Railway Company – Consolidation of Operations – CSX Transportation, Inc.*, Decision No. 3, STB Served December 2, 2005, at 2. NS never addresses the public interest standard for issuance of a supplemental order, and never challenges whether BRI/ECDC have met this standard. The Board should deny NS's Motion and proceed to develop a record with respect to the public-interest aspects of BRI/ECDC's request for a supplemental order permitting Conrail to switch the BRI facility.

B. Supplemental Order Proceedings No Longer Require a Showing of Changed Circumstances

NS also asserts that BRI/ECDC must show "substantially changed circumstances" in order to obtain a supplemental order. Motion at 15. This assertion ignores over twenty years of precedent.

NS cites two ICC decisions from the early 1980's in support of its thesis that BRI/ECDC must show good cause in the form of substantially changed circumstances in order to obtain a supplemental order: *People of the State of Illinois v. I.C.C.*, 713 F.2d 305, 310 (7th Cir. 1983), and *Greyhound Corp. v. I.C.C.*, 668 F.2d 1354, 1362 (D.C. Cir. 1981). Neither of those precedents is applicable today, because they interpreted 49 U.S.C. § 11351 which was a predecessor of §11327. The two cases involved rail mergers that were consummated in the 1970s, when §11351 read:

> For *good cause shown*, the Interstate Commerce Commission may make *as it may deem necessary* orders supplemental to an order made in a proceeding under sections 11342-11345.

H.R. Rep. 96-332, 1980 U.S.C.C.A.N. 1224 (emphasis added). The current statutory provision reads: "When *cause exists*, the Board may make *appropriate* orders supplemental to an order made in a proceeding under sections11322 through 11326." 49 U.S.C. § 11327 (emphasis added). The cases cited by NS which analyze what "good cause" and "necessity" entail are no longer relevant to determinations regarding supplemental orders under the current statutory provision.

More recent case law on supplemental orders reflects the change in the statutory standard. In Finance Docket No. 32299 (Sub-No. 1), *Norfolk Southern Railway Company – Consolidation of Operations – CSX Transportation, Inc.*, Decision No. 3, STB Served Dec. 2, 2005, at 2, the Board stated:

> Under 49 U.S.C. 11327, we have continuing authority to enter supplemental orders and to modify decision entering merger and control proceedings under 49 U.S.C. 11323. *Cause* must exist to authorize an alteration of a previously approved transaction. For approval, we must find this modification to be consistent with the public interest.

Id. at 3 (emphasis added). The public interest is determined by balancing the benefits of the requested order against any harm to competition or to essential services. *Id.* Such supplemental orders may be entered upon request or upon the Board's own initiative. Finance Docket No. 33556 (Sub-No.4), *Canadian National Railway – Control – Illinois Central Corp.*, Decision No. 3, STB served Nov. 7, 2001, at 4. One legitimate purpose of a request for a supplemental order is to ensure that the approved transaction and related conditions are being implemented in a manner that is fair and preserves competition. Finance Docket No. 32760 (Sub No. 21), *Union Pacific Corporation, Union Pacific Railroad Company, et al. – Control and Merger – Southern Pacific Rail Corporation, et al.*, Decision No. 21, STB served December 20, 2001, at 6. None of these more recent decisions suggest that a showing of "changed circumstances" is a condition precedent to issuance of a supplemental order under 49 U.S.C. § 11327.

BRI/ECDC summarized the benefits of the requested supplemental order and weighed them against the possible burdens at pp. 9-14 of their Petition, in accordance with recent decisions regarding supplemental orders in rail consolidation cases. NS did not challenge these allegations in its Motion, so there is no basis for dismissal of BRI/ECDC's request for a supplemental order.

Conclusion

For the foregoing reasons, BRI/ECDC respectfully request that the Board deny NS's Motion to dismiss their Petition in this proceeding, proceed with *Federal Register* publication of notice thereof, and issue a procedural schedule as requested at page 16 of the Petition.

Respectfully submitted,

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Dated: March 1, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March, 2006, caused copies of the foregoing Reply (including the Supplemental Verified Statement of Paul H. Reistrup) to be served by hand upon Washington counsel for Applicants, and by United States Mail upon all other known parties of interest, as follows:

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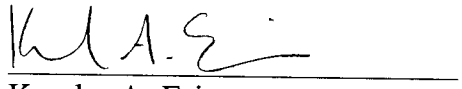

Kendra A. Ericson

Finance Docket. No. 33388 (Sub-No. 100)

SUPPLEMENTAL VERIFIED STATEMENT OF PAUL H. REISTRUP (MOTION TO DISMISS)

I. Introduction

My name is Paul H. Reistrup. I am the same Paul H. Reistrup who previously submitted a Verified Statement (dated January 9, 2006) that was included with the petition for clarification or in the alternative for supplemental order with respect to the North Jersey Shared Assets Area ("NJSAA") filed in this proceeding by Bridgewater Resources, Inc. ("BRI") and ECDC Environmental, L.L.C. ("ECDC"). My qualifications are set forth in my original Verified Statement.

I have read the motion to dismiss BRI/ECDC's petition filed by Norfolk Southern Railway Company ("NS"), as well as the accompanying verified statement of Conrail's Chief Engineer, Timothy C. Tierney. The purpose of this supplemental testimony is to respond to NS's mis-characterizations of my original testimony concerning what is included within the CP or controlled point at Port Reading Jct. In addition, I will explain why, as a factual matter, NS's motion (including Mr. Tierney's testimony) is not dispositive with respect to either the geographic limits of the NJSAA at Port Reading Jct. or the question whether Conrail can serve the BRI waste transfer facility using tracks located within the NJSAA.

II. The CP at Port Reading Jct.

According to Schedule 1 of Attachment 1 to the Transaction Agreement, which both parties agree is the controlling document, the NJSAA includes the portion of

the former Conrail Lehigh Line extending from "CP-Port Reading Jct." eastward to "Oak Island Yard." In my original Verified Statement I testified that the term "CP" or controlled point includes all of the tracks, circuits and signals (including approach signals) within an interlocking.[1] From this, it follows that the reference to "CP-Port Reading Jct." in the Transaction Agreement includes all of the railroad facilities within the interlocking at Port Reading Jct.

Contrary to the statements in NS's motion, I did not testify either that the term "CP" encompasses third-party (i.e., non-railroad) property, or that "CP-Port Reading Jct." includes everything within a two-mile radius of the switch connection between the Lehigh and Trenton lines (NS Motion at 10). The point of my original testimony was simply that if the NJSAA includes everything within the designation "CP-Port Reading Jct.," which is what the language of the Transaction Agreement says, then it includes everything between the approach signals for the interlocking (including the point where BRI's Royce Spur connects with the Royce Running Track, which is part of the Lehigh Line).

The CP or interlocking at Port Reading Jct. governs the movements of three railroads – NS, CSXT and Conrail – through the turnout at the "junction" (connection) between the Lehigh Line and the Trenton Line from three different directions (east, west and south), as well as various ancillary turnouts such as the easterly turnout for the Royce

[1] In other words, "CP" is code for "interlocking." A railroad interlocking controls movements over a crossing diamond, through crossovers (*e.g.*, between two main tracks), and through turnouts at junctions or connections between different railroad lines.

Running Track and the turnouts for the northerly Manville Yard leads. The facilities in this interlocking include the tracks and electronic circuits between both the home signals for the interlocking and the approach signals (the approach signals are connected by electronic circuits to the home signals; their aspects are governed by the aspects of the home signals).

There are three sets of home and approach signals for the Port Reading Jct. interlocking. They are located (1) on the Conrail-owned portion of the Lehigh Line east of its connection with the Trenton Line, (2) on the NS-owned portion of the Lehigh Line west of its connection with the Trenton Line, and (3) on the CSXT-owned portion of the Trenton Line south of its connection with the Lehigh Line. Conrail controls this interlocking, which means it controls the signals governing train movements through the interlocking by all three railroads, in all three directions.

A CP thus is not a single point on a railroad track, as NS implies at p. 11 of its motion. NS's Witness Tierney acknowledges that a CP includes all tracks within an interlocking ("A 'CP' designation signifies a station designated in the Timetable where signals are remotely controlled from the control station."). Mr. Tierney also confirms that the CP/interlocking at Port Reading Jct. is controlled by Conrail ("the designation 'CP-Port Reading Jct.' signifies that the switches at that point and the signals controlling access to the interlocking are controlled by the Conrail North Jersey Train Dispatcher"). *See* Tierney V.S. at 2.

The FRA regulation defining "Point, Controlled", cited on p. 11 of NS's motion, is also inconsistent with NS's implication that a CP is a single point. The regulation defines a CP as "A *location* where signals and other functions of a control system are controlled from the control machine" (49 C.F.R. § 236.782; emphasis added). As Mr. Tierney acknowledges, "location" refers to an interlocking, which includes the track and electronic circuits between the approach signals at either end of the interlocking.[2]

The point of all this is that the material in NS's motion actually confirms my original testimony that "CP-Port Reading Jct." does not refer only to the point where the Lehigh and Trenton lines intersect, but also includes the tracks and signal circuits within the interlocking that control train movements through the interlocking.

III. Boundaries of the NJSAA at Port Reading Jct.

NS states in its motion that the boundaries of the NJSAA at Port Reading Jct. are defined by the Transaction Agreement. I agree. However, as noted above, the Transaction Agreement actually describes the boundaries as being encompassed by "CP-Port Reading Jct.," which is broad enough to include all railroad facilities within the interlocking governing train movements in three directions at Port Reading Jct.

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[2] At page 18 of its motion NS states that it is illogical to make "the demarcation between railroad territories" depend on where signals happen to be located. However, this is exactly how interlocking limits are defined. Had the parties to the Conrail control transaction desired to demark the limits of the NJSAA more precisely or permanently, they easily could have done so by reference to specific property ownerships, mileposts or "cut points" rather than by using the broad term "CP-Port Reading Jct."

The two color-coded maps included as attachments to Schedule I of the Transaction Agreement (reproduced in enlarged form as Exhibits 3 and 4 to NS's motion) do not shed further light on what is included within the NJSAA. These maps are actually schematics that show the tracks assigned to each carrier in the Port Reading Jct. Area.[3] They are not to scale, and they are not definitive in terms of who owns exactly what tracks in the area, and they certainly are not definitive in terms of the operating rights of each carrier in the area.

With respect to track ownerships, for example, NS states at p. 9-10 of its motion that these schematics show Conrail ownership of the Lehigh Line (blue color) as extending west to the junction between the Lehigh Line and the Trenton Line, with NS owning the portion of the Lehigh Line west of the junction (green color) and CSXT owning the Trenton line (orange color) south of the junction. However, the 1999 deed by which Conrail conveyed a portion of the Lehigh Line to NS (actually, Pennsylvania Lines LLC), attached to NS's motion as Exhibit 5, shows the division of ownership at Milepost 35.92 on the Lehigh Line. This location is several hundred yards west of the junction between the Lehigh and Trenton Lines, and more than 100 yards west of the point where

[3] These maps are not the maps containing the "cut points" for the SAAs that I recall from my time as Vice President-Passenger Integration at CSXT, which BRI/ECDC have requested Conrail to produce in discovery. *See* page 6 of my original Verified Statement.

the former Reading Connector crossed the Lehigh Line at grade.[4]

The Conrail/NS property demarcation line at Milepost 35.92 is also located slightly east of the switch connection between the Royce Running Track and the Lehigh Line main track (*see* Exhibit 5 to my original Verified Statement). However, this does not mean that Conrail lacks the right to operate west of this point. Property ownerships are not dispositive indicators of the limits of Conrail's operating rights because an interlocking (CP) can include the property of more than one railroad. This is confirmed by the passage from Mr. Tierney's testimony cited on page 11 of NS's motion:

> An interlocking may, and frequently does, include the tracks of different railroads, but by agreement among those railroads, one of them controls all movements over the tracks within the interlocking. The boundaries of an interlocking do not define the ownership of the various tracks within the interlocking and do not determine the use of equipment and personnel of those various tracks by those other railroads.

Normally, a railroad that controls operations through an interlocking has the right to operate its trains over tracks in the interlocking. Neither NS nor Mr. Tierney states that Conrail lacks the right to operate over the tracks within the interlocking at Port Reading Jct. This is important, because – as NS notes at p. 6 of its motion – Section 1(ss) of the NJSAA Operating Agreement defines the "Shared Assets" as meaning "all tracks,

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[4] Most of BRI's Royce Spur was originally part of the Reading Connector. If that line still existed in its entirety, it would be a Conrail retained asset at the location of its crossing of the Lehigh Line. BRI/ECDC have requested information from NS and Conrail in discovery concerning the circumstances underlying the discontinuance of the Reading Connector and the sale of part of it to BRI's predecessor.

lands, easements, rights of way, structures, facilities, appurtenances and rights related thereto, which CRC owns, leases *or otherwise has the right to operate over. . .*" (emphasis added). Nor does NS or Mr. Tierney state specifically that the boundary of the NJSAA on the Lehigh Line ends where Conrail's property ownership ends (at Milepost 35.92).

The schematic of post-transaction track ownerships attached to NS's motion as Exhibit 3 confirms that track ownerships and operating rights are not congruent in the Port Reading Jct. area. Exhibit 3 shows a line segment in blue color (designating that it was assigned to Conrail as a retained asset) called the "GSA Ld." that connects with the NS-owned portion of the Lehigh Line (green) and the CSXT-owned portion of the Trenton Line (orange) west of the junction between the Lehigh and Trenton Lines. The connection with the Lehigh Line is west of the westerly end of the Royce Running Track ("Royce RT"), with which BRI's Royce Spur ("Manville Sdg.") connects. There would be no purpose in assigning this line segment to Conrail if Conrail could not operate over it; yet the line connects only with lines assigned to NS and CSXT. This appears to confirm that Conrail has the right to operate over tracks owned by NS and CSXT that are within the interlocking (CP) at Port Reading Jct.

Part of the right-of-way underlying BRI's Royce Spur also appears to be included within the CP at Port Reading Jct. NJSAA. The description of the Conrail Retained Assets in Schedule 1 to the Transaction Agreement includes "real estate (whether or not used for operating purposes) adjacent or in proximity to the Routes

included in the Retained Assets. . ." *See* Item 3(A)(4) of Schedule 1, set forth on page 91 of Volume 8B of the Conrail control application. The Royce Spur occupies property adjacent to the Lehigh Line at and east of Milepost 35.92 that is owned by (and leased from) Conrail.[5] NS has not disputed this.

Nor has NS disputed my testimony (1) that the Royce Spur connects with the Lehigh Line at a point that is within the interlocking (CP) at Port Reading Jct., and (2) that Conrail has recently used NS-owned track within the interlocking to provide switch service to the BRI facility via the Royce Spur. See pp. 7-8 and 10 of my original Verified Statement. The fact that Conrail has on occasion provided switch service between the BRI facility and Manville Yard is consistent with its apparent right to operate over all tracks located within the limits of the interlocking (CP) at Port Reading Jct.

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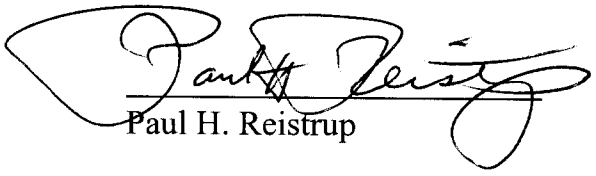
[5] The Royce Spur in this area is denoted by the curved line immediately below "Manville" in the upper left-hand portion of the property conveyance map attached to the Conrail/Pensylvania Lines LLC deed (page 7 of Exhibit 5 to NS's motion).

VERIFICATION

I, Paul H. Reistrup, verify under penalty of perjury that I have read the foregoing Supplemental Verified Statement and know the contents thereof, and that the same are true and correct except as to those matters stated on information and belief, and as to those, that I believe them to be true. Further, I certify that I am qualified and authorized to file this statement.



Paul H. Reistrup

Executed on: February 23, 2006.